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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	
v.	1:19-cr-142-01-LM
	January 12, 2021
	9:06 a.m.
NATHAN CRAIGUE	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Government: John S. Davis, AUSA
Anna Dronzek, AUSA
Aaron G. Gingrande, AUSA
United States Attorney's Office

For the Defendant: Dorothy E. Graham, Esq.
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P R O C E E D I N G S

THE CLERK: For the record, this is a motion hearing in a hearing regarding jury instructions in the United States vs. Nathan Craigue. It is 19-cr-142-01-LM.

THE COURT: All right. Good morning, everybody.

I am intending that we go in the following order: We start with the jury instructions question and then we do the three motions in limine, 1, 4, and 5, in that order.

So you'll just have to let me know who's doing the arguing with which motion. And I won't lock you down on that. If one of -- counsel wants to intervene, I'm fine with that. Just raise your hand and ask to speak. Otherwise, I'll presume that the attorney that you've told me is arguing the particular motion is going to be lead on that motion.

Let me just state for anyone watching this hearing via Zoom, they should be aware of our local rule that prohibits any sort of photographing, recording, any audio or video, broadcasting, or transmitting these court proceedings. Even a screenshot of this proceeding would violate the court's rule. So please don't violate Local Rule 83.8.

I've entered public access findings in this matter. Those are on the record. And since this is an oral argument on legal motions, I don't think there's any need to go over the -- the reasons why we're having this hearing via video. I think those are obvious.

Okay. Let me just say for Mr. Craigue's benefit that should you desire to speak to your counsel during this hearing, I'd be happy to let you do that. If something comes up and you want to talk to them, we can put you in a breakout room. And so I want to make sure that you -- just raise your hand, notify me. Somebody will see. Unmute your mic and just say, Judge, can I speak to my counsel, and we'll make that happen for you.

Do you understand that? I can see you, so -- and you're muted, but I can see you shaking your head. You understand?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. Good. All right. Just -- just notify us somehow that you want to talk to them.

THE DEFENDANT: All right.

THE COURT: All right.

THE DEFENDANT: Thank you.

THE COURT: You're welcome.

All right. Now, let's start, if we can, with

the jury instructions. And before we get to this question of *Darden* and the factors, let me ask everybody about the question of knowingly and willfully and how I go about defining that for the jury.

Footnote 11 in the defendant's request for jury instructions lays out an argument which I tried to piece together as best I could. I think what the defendants are arguing is that the law has shifted and although First Circuit case law, *U.S. v. Zhen Zhou Wu*, 711 F.3d, still only requires that -- that which the government has sought here, and I believe I gave in my last false statement case, which is that the defendant knew his statement was false when he made it or consciously disregarded or averted his eyes from its likely falsity.

The defendant is saying there's really a circuit split at this point and that the government's Solicitor General conceded -- in a case that went up from the First Circuit, *U.S. v. Russell* -- conceded that the First Circuit's definition of willful in the statute was erroneous and relied on a Supreme Court case, *Bryan*, B-r-y-a-n, 524 U.S., and that adds the element of knowledge that his conduct was unlawful.

Now, apparently the Solicitor General conceded -- if footnote 11 is correct -- conceded that

that was the case, but it's not clear at this point, the First Circuit has not so stated or so held, and so I guess I ask the government about this question.

Obviously we don't want to create appellate error where we don't need to and if, in fact, the defendants are correct about this, there's some question that the law requires that I tell the jury that Mr. Craigue had to know while making the statement that his conduct was unlawful.

So let me have you address that footnote 11 first, if you would. And let me start -- is it Attorney Mirhashem? I see you're not muted, so I'm going to assume you're speaking on this one.

MR. MIRHASHEM: That's correct. I'm addressing that one from our side.

THE COURT: All right. And Attorney Davis is not muted, so I'm going to assume it's Attorney Davis.

So, Attorney Mirhashem, why don't you tell me how I got that wrong or summarized that incorrectly and clarify it for us. And if I stated it correctly, I'll just -- I'll just shift to Attorney Davis and have him tell me whether he's open to adding to the instruction in the way that you suggest in an effort perhaps to avoid some sort of error.

MR. MIRHASHEM: I think your Honor has stated

it correctly. I mean, I think the only thing I would add is, first of all, regardless of what happens, we clearly want to preserve this issue. So our position is our position on what the -- what instruction is required.

Also I think implicit in what your Honor said, and we certainly take that position, this is an open question in this circuit. In light of the First Circuit decision you cited but the Solicitor General's concession, I think this Court is empowered to agree with us and so we not only seek to preserve the issue, but we also would like to try to convince your Honor that you should give this instruction.

THE COURT: Well, maybe Attorney Davis will shortcut this for us. So let me ask him.

What's your position on adding the knowledge component?

MR. DAVIS: Judge, we oppose the proposal that the government would have to prove beyond a reasonable doubt the defendant's knowledge that his conduct was specifically unlawful. That would be a shift of enormous -- with enormous implications in a statute that has general application and has been applied consistently, as far as I know, perhaps other than in the Ninth Circuit for many years, including the many

years since the mid '90s when the *Bryan* and *Ratzlafv cases were decided.*

So we have proposed what is the First Circuit pattern instruction about what knowingly and willfully means, and it does mean that the defendant must know that his statement is false. Certainly that subjective knowledge is required in the proof and the defendant also has to act with bad purpose in a general way.

But to require proof beyond a reasonable doubt that the defendant actually understands that there is a Section 1001 that applies to matters within the jurisdiction of the executive branch of the United States and that this is such a matter would take -- take the statute far beyond what -- what the -- what Congress intended in, again, this very old statute of general application.

Now, I have not actually found the footnote in the -- in the concession of error matter from 2014. I take the defendant at their word. But I would only say that the Russell case was not a 1001 case, as far as I know. It was a 1035 case and 1035 is a much more specific and more technical area than 1001.

And I know of no Department of Justice policy or requirement that says that a -- a statement made essentially in or as justification about a different

statute entirely in a footnote by the Solicitor General in some way binds prosecutors in the face of all of the precedent that the Court acknowledges.

And, again, *Bryan* -- the Court talked about a shift in the law, but the *Bryan* case was in the '90s, 1998, so it's 22 years old. And I can't find, again, outside of the Ninth Circuit, a pattern instruction that would require the government to prove actual knowledge of the law that the defendant is violating in the same way that one does have to prove that, say, in a tax case or in a structuring case.

I would also say that such a law would make -- or such an instruction would make ignorance of the law a defense and it would also be, as a practical matter, unworkable in many, many cases where -- where the defendant doesn't necessarily know what the executive branch jurisdiction is or even that an investigation in the federal executive branch is ongoing.

And the *Yermian* case from back in the '80s makes it very clear that the government doesn't have to prove knowledge of a particular investigation, but if the Court were to adopt this proposal by the defense -- and, again, I don't -- I don't see the defense saying anywhere that any court in the First Circuit at least has given this instruction, but if the Court were to

adopt it, then effectively the government would have to prove -- as a predicate to proof that the defendant knows he's committing a federal crime, the government would have to prove the defendant's knowledge of the executive branch agency of its jurisdiction over this particular matter and over the fact of an investigation.

And, again, many, many cases and 1001 say that you don't have to prove the defendant knows that there's an investigation; you don't have to prove the defendant knows there's federal -- federal jurisdiction over a matter. What you have to prove is that the defendant knows he is -- what he is saying is false.

So to a -- to adopt this would effectively throw the -- throw the baby out with the bath water and I -- I think it would be very, very difficult, if not impossible, in many different contexts -- and 1001, of course, comes up in all kinds of different kinds of practical contexts, but it would be very difficult in many cases to charge or prove the statute.

And, again, it's a general application statute about fraudulent statements, false statements in government investigations. It was never intended to be applied that way.

So --

THE COURT: A couple questions for you.

MR. DAVIS: Sure.

THE COURT: Okay. First, I think that what the defendants are asking for is an instruction that the defendant had to know in a general sense that his conduct was unlawful. I think that's the nature of the instruction they're asking for.

Also, *Rehaif*, you know, the recent Supreme Court case, clearly provides at least some notice that you've got to look at each of the statutory elements with regard to a culpable mental state of a defendant. And I think -- obviously it's not the same case, it's not the same statute, but that is a more recent case.

Russell, which is cited in footnote 11, is a 2014 case, so it's a more recent decision than the *Bryan* case. And what is cited in footnote 11 -- and again, this would be something worth looking for and finding, but what's cited here is that according to the defense, in light of a circuit conflict over the definition of willfulness in a 1001 prosecution, the Department of Justice has advised prosecutors to request the more defendant-friendly instruction. That's in footnote 11. And, again, I -- they cite *Russell* and you're telling me *Russell* deals with, I think, 1035.

But in any event, could you respond to those general questions and then I'll obviously ask Attorney

Mirhashem to respond.

MR. DAVIS: Just about *Rehaif*, I mean, I think a distinction from, say, 922(g) is the way the statute is written. 1001 starts off by saying: Except as otherwise provided in this statute, whoever in any matter within the jurisdiction of the executive, legislative, or judicial branch of the United States. All of that is said before the adverbs knowingly and willfully occur.

Knowingly and willfully modify the making of a materially false statement or representation. They clearly do not modify the fact -- the fact of a matter, the fact of the jurisdiction of the executive branch, and that -- that distinction matters. That's the way that text is written. And knowingly and willfully, the way they appear, only modify the making of a materially false statement.

So I certainly don't agree that *Rehaif* or the -- the *Bryan* cases should or -- should be extended here.

I think it is true that -- that the defense is slightly -- is -- is subtly saying that the -- Mr. Craigue was aware of the specific provision of the law he's charged with violating, but it goes on to say the government must prove that when he allegedly made a

false statement, he was aware that was he was thereby acting unlawfully.

I think that phrasing effectively puts the government in -- in that box of having to prove -- sorry. That phrasing puts the government in the box of effectively having to prove that he knows there is some federal law he's violating and proving that would be very -- very difficult.

I'm also advised of the following from the department: The Solicitor General's concession in *Russell* and *Ajoku* means that henceforth the department will interpret the term willfully in the context of Sections 1001 and 1035 to require that a defendant be aware that the conduct with which he is charged was, in a general sense, prohibited by law. In other words, the defendant must have acted with a bad purpose within the meaning of *Bryan*. But this interpretation is not intended to and should not impose a significant burden on prosecutors under Sections 1001 and 1035 in the vast majority of cases.

I do think a bad purpose -- you know, we may -- I may be splitting hairs here, your Honor, and that a -- a bad purpose general willfulness instruction is appropriate.

But, again, the -- once the -- the phrasing

effectively allows the defendant to argue that the defendant didn't know about what OSHA is and the defendant didn't understand federal or state government branches and didn't know about the extent of OSHA's jurisdiction and et cetera, et cetera. There's a thousand technical ways to split hairs about that and if the Court's instruction allows those arguments, again, the statute is effectively narrowed far beyond what the legislature intended.

So maybe I haven't addressed it, your Honor. I do think a bad purpose type instruction is -- is appropriate, but a -- one that requires knowledge, proof of knowledge that a -- that a law is being violated goes too far.

THE COURT: Go ahead, Attorney Mirhashem.

MR. MIRHASHEM: Your Honor, let me cut to the chase. What Attorney Davis is saying we're asking for, we are not asking for. What he's saying he's okay with is what in writing we have asked for.

Our proposed instruction says Mr. Craigue must have acted with a bad purpose to disobey or disregard the law. The government need not prove that Mr. Craigue was aware of the specific provision of law that he's charged with violating, but the government must prove that when he allegedly made a false statement, he was

aware that he was thereby acting unlawfully.

I just heard Attorney Davis make an argument why our proposed instruction is correct. So --

THE COURT: All right. So the jury asks me as its first question, do we need to find that he understood and knew about the, you know, false statement statute or any OSHA reg that would require him to be truthful?

MR. MIRHASHEM: So I think as far -- I mean, that's a little complicated. I think my answer is two parts.

First of all, at one level, the answer is no, you don't have to find that he was aware of a specific statute; you only need to find that he acted with a bad purpose to disobey or disregard the law. Okay? So I think that we're not asking the jury to find that Mr. Craigue was aware of 18 United States Code Section 1001.

I think it gets a little bit complicated if it's a jury question, depending on the evidence in the case, because if there is reference to testimony about some regulations, you know, discussions with Mr. Craigue about them, well, you can certainly infer knowledge if somebody actually knew, right? So I don't think --

THE COURT: Right.

MR. MIRHASHEM: -- it's as simple as saying, like, no, that's never an issue. But starting out, the issue is only the bad purpose that the government here is -- is acknowledging would be appropriate and is apparently the position of the -- of the government and nationally.

I mean, my footnote 11, just to clarify, is basically taken from Attorney Seth Aframe's requested jury instruction in the *Suzanne Brown* case. I've cited that the government says no case in the -- no court in the First Circuit has given this instruction. This court, Judge Laplante, the District of New Hampshire, gave that instruction in *Suzanne Brown*, 16-cr-21-JL; and this argument that I make here is largely a cut-and-paste job from Attorney Aframe's argument for that instruction.

So -- and just one other thing I would say. I do think that *Rehaif* is highly relevant here because that case I think more broadly stands for the proposition that, you know, you read a statute such that all the words in the statute do work to the extent that a natural reading of the statute suggests.

The government's proposed instruction makes the word willfully -- not their proposal orally, but in writing -- makes the word willfully surplusage. It

basically means he knew. Well, so what does it add to just knowingly? That phrase has to do work.

Now, it can do work in two ways. There are cases, such as *Cheek*, in the tax context where the government does have to prove knowledge of a particular statute. To be -- to willfully violate certain tax statutes requires knowledge of the specific obligation imposed by a particular statute.

We're asking for something less. We're asking for bad purpose, but what Attorney Davis didn't say is the rest of it is bad purpose to disobey or disregard the law. It's not like what does it mean to say somebody had a bad purpose. You have to show that they had a bad purpose to disobey or disregard the law.

THE COURT: Was *Suzanne Brown* a 1001 case?

MR. MIRHASHEM: It was. Attorney Brown -- Attorney Graham actually --

THE COURT: Okay.

MR. MIRHASHEM: -- was counsel for the defendant and so we're familiar with that case.

THE COURT: Okay. And Seth Aframe, you're telling me, argued the very position that you're taking --

MR. MIRHASHEM: Right. If you look at --

THE COURT: -- which is urging Judge Laplante

to adopt your position --

MR. MIRHASHEM: As --

THE COURT: -- because he knows he's the guy on the appeal who has to argue if it gets reversed, so he doesn't want it to be reversed.

MR. MIRHASHEM: Exactly.

THE COURT: Okay. Well, it looks like Attorney Davis is conceding that in a general sense that the conduct was unlawful is something that he would support and approve. Bad purpose to disregard the law, that's also included, Attorney Mirhashem.

MR. MIRHASHEM: You know what, I'm going to -- just to make sure that I'm not making a mistake here, you're asking if that's included in the *Suzanne Brown* instruction, right?

THE COURT: Yes.

MR. MIRHASHEM: Yeah, I want to bring that up, just to make sure that I have that right, because I do remember taking the argument from that case, but to what extent does our proposed instruction track it, I need to look at that to make sure --

THE COURT: Well, let me -- let me cut to the chase --

MR. MIRHASHEM: Okay.

THE COURT: -- and just say that it makes

sense to me at this point if -- it looks like you have agreed on the heart of it and obviously it's going to be an issue at trial. And I would obviously want to hear from counsel on what -- what you're able to argue to show that he did not have a bad purpose, that his purpose was innocent. I'll be interested, obviously, in those questions, sort of around the edges, what is admissible, what does the government have to show, but it sounds like you could meet and confer and come up with an instruction that you both agree on.

And so rather than have me struggle with this and issue a lengthy decision on this, it makes sense to me to have you meet and confer, propose a joint instruction on this. It sounds like you basically agree.

So how does that sound for moving on from knowingly and willfully and moving into the question of the *Darden* factors? Are you guys good with that?

MR. DAVIS: That's fine with us, Judge. The -- the only thing I'd add is that we are definitely -- there is the notion of reckless disregard or a conscious purpose to avoid learning that's in our instruction regarding knowingly and willfully and we very much believe that's based on the -- you know, that's based on precedent and the statute and we

would -- we would want to ensure that the notion that a defendant who demonstrates a reckless disregard for the truth or a conscious purpose to avoid learning the truth is equally culpable.

So, anyway, I'm sure we can work that out, but we haven't discussed that aspect of it so far and I would just flag that as an important part of the instruction for the government. But we can -- we can certainly --

THE COURT: That goes under knowingly.

MR. MIRHASHEM: Right.

THE COURT: That goes under knowingly.

Do you dispute that that's part of the knowingly element?

MR. DAVIS: Well, we have it as --

THE COURT: You do dispute it.

MR. DAVIS: -- a false statement is made knowingly and willfully in our proposed instruction. That is, it's part of both -- both parts of the intent requirement, but ...

MR. MIRHASHEM: Your Honor, we absolutely object to that. Part of the issue is the only authority the government has cited for its instruction is Seventh Circuit Federal Criminal Jury Instructions (modified). And so I -- I do object to this notion of coming in and

saying this is the law with no support.

Our contention is the statute says knowingly and willfully, says nothing about reckless disregard. If the government claims that that instruction is appropriate, we would want to be heard on that. I think that it's basically asking for a willful blindness instruction in a context which we contend is inappropriate.

The First Circuit has repeatedly cautioned against improper use of willful -- blindness instructions. I mean, one of the things that the government I think categorically gets wrong here is the statute says knowingly. There are some circumstances the First Circuit has said you may infer knowledge from certain reckless disregard. It's not -- it's not something you can just add in and say, oh, instead of knowledge, why don't we just prove you recklessly disregarded it. There's no support for that in the case law. There is support for willful blindness being, in certain situations, appropriate.

So, for example, since the government keeps talking about pattern instructions, if you actually look at the pattern instruction for knowledge that, you know, it does say: In deciding whether defendant acted knowingly, you may infer that defendant had knowledge of

a fact if you -- and then it goes on and there's a whole paragraph.

So this notion of taking a statutory term which says knowingly and adding to it, does it occur in cases? Have I seen that instruction? I have. But I think it's completely inconsistent with -- with the law and we certainly object to anything less than knowledge being sufficient to establish guilt.

THE COURT: What about the *Suzanne Brown* case? What was requested by the government in that case?

MR. MIRHASHEM: I think they requested something very similar to here and it was -- the jury was so instructed without objection from the defense.

THE COURT: So very similar to here; you mean very similar to what I'm arguing, Judge.

MR. MIRHASHEM: No, no, no, very similar to what the government is asking for here, I think. But that issue wasn't --

THE COURT: Okay.

MR. MIRHASHEM: I think what happened in *Brown* was -- I was just about to actually -- I was pulling up the instructions, but my recollection of *Brown* is that -- I'm just about to get to the instructions. Just give me a moment and I can ...

So what happened is I'm looking at the

government's proposed instructions in *Brown* right now. Let's see.

THE COURT: I think it's a false statement is made knowingly if the defendant had actual knowledge of its falsity or acted with reckless disregard of the truth with a conscious purpose to avoid learning the truth.

MR. MIRHASHEM: Right. I think --

THE COURT: I think that would be --

MR. MIRHASHEM: Right. I'm looking at *Brown*. The government did ask for that. We object to that. We object to -- the statute says knowingly and there may be circumstances -- and what I would rely on, by the way -- let me just give you our cite.

THE COURT: I'm going to have you brief this issue. So it's clear you disagree on this. It's an important question and it's complicated enough that I'd like to have some briefing on this particular question.

MR. DAVIS: May I respond very briefly, your Honor?

THE COURT: You sure can. Go ahead.

MR. DAVIS: I'm sorry.

The -- I think the defense just said this doesn't come from the pattern instruction. The pattern First Circuit instruction that we all use says: A false

statement is made knowingly and willfully if the defendant knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

I think the defendant just said there was no authority for the proposition. In *U.S. v. London*, which is 66 F.3d 1227, the First Circuit stated that in the context of 18 U.S.C. 1001, a false statement is made knowingly if defendant demonstrated a reckless disregard of the truth with a conscious purpose to avoid learning the truth.

In addition, as for whether knowingly and willfully -- whether this is merely a definition of knowingly or knowingly and willfully, in *U.S. v. Gonsalves*, which is 435 F.3d at 72, the First Circuit said: While interpreting the term willfulness, we have held that it means nothing more in this context than that the defendant knew that his statement was false when he made it or, which amounts in law to the same thing, consciously disregarded or averted his eyes from its likely falsity. And I'm quoting there from *Riccio*, which is 529 F.3d 40.

So the language in our proposed instruction on that point is right out of the pattern instruction and it's right out of the First Circuit case -- First

Circuit cases both about knowingly and willfully.

That's all, Judge.

THE COURT: All right.

MR. MIRHASHEM: Your Honor, if I misstated the law, I apologize. What I would ask is that the government -- these cases that they just cited they put in writing and we get an opportunity to respond.

MR. DAVIS: We'll certainly talk with them, Judge, and confer. So --

THE COURT: Okay.

MR. DAVIS: No problem.

THE COURT: All right. And I do want to have a joint request for an instruction with respect to willfulness. It looks like you agree.

With respect to knowingly, there's disagreement, so if you can't meet and confer and reach agreement on that, I want you to brief that question. And we do have time, obviously, before trial, so that is a luxury and I would think that ultimately -- I think the government has sought the knowingly instruction in its proposed jury instructions and I think, Attorney Mirhashem, it would -- if you could brief this question with respect to knowingly, that would be helpful. And, you know, I'm open to whatever briefing schedule works for counsel.

So to that extent, just meet and confer about that schedule, talk to Attorney Esposito, and we'll -- we'll require a timeline that works. But I would like this briefed.

So if you need 14 days from today's date, that is fine with the Court, and if the government wants to file a brief further arguing for the knowingly instruction and then you respond to that, I'll let you meet and confer. I'll be agreeable to however you want to structure that, but I do want to have briefing on it so that I can decide the question.

Okay. Everybody clear on sort of the scope of that briefing?

MR. MIRHASHEM: Yes. If I understand correctly --

THE COURT: Okay.

MR. MIRHASHEM: -- you've left it that you -- unless we come to an agreement, you want the defense to initially file something. I just -- I'm not sure, like, what you --

THE COURT: I'm -- Attorney Davis, are you willing to file the first brief on the question of knowingly?

MR. DAVIS: Yes. Judge, I would just suggest we meet and confer and see what we can agree on.

That -- I would certainly hope to do that first and we see what -- where we are.

THE COURT: Yes, I agree with that.

MR. DAVIS: We may be able to persuade the defense about the case law and also about the instruction used in *Brown*.

But -- and so we may not end up disagreeing on that either, but certainly 14 days is fine as a -- the government can -- would go first on -- on a -- on the question of how to instruct on the mens rea requirement for 1001.

THE COURT: Okay. And the defense, 14 days thereafter?

MR. MIRHASHEM: That would be great, your Honor.

And I certainly agree. I mean, you know, if we confer and we reach an agreement, we'll let the Court know we've reached an agreement. But if we don't, I think that's a -- that's a good schedule. Thank you.

THE COURT: All right. And you're going to file a joint proposed jury instruction with respect to willful anyway, so if you can include any agreement you reach on knowingly, that would be -- you can just include that in the same joint proposed jury instruction.

If you do disagree, then the government will file a brief within 14 days of today. I'll issue a short -- very short procedural order so you have -- so you have this information. If you need an extension, obviously, if both sides agree, I will grant that.

Okay. Now let's move to the question of how I instruct the jury with respect to the element of this being a false statement.

MR. MIRHASHEM: May I just bring up something before we move on, your Honor?

THE COURT: Yeah, sure.

MR. MIRHASHEM: There are other disagreements in the elements instruction. I don't know if you want to take them up or not. But I -- I don't know if you want to just go through them now or you don't, but there are a few other disputed issues as far as the elements.

So if you want to take them up now, that's fine with us, if you don't want to take them up, but I can tell you what they are.

One is that we asked for an instruction that just says false and defines it. They say --

THE COURT: Just says what?

MR. MIRHASHEM: False, that they have to prove --

THE COURT: Okay.

MR. MIRHASHEM: -- that a statement was false. They say false, fictitious, and fraudulent -- which is right, that's what's in the statute, that's what's in the indictment -- but then fictitious and fraudulent need to be defined if we're going to -- if we're going to tell the jury that they can convict not just based on false, but fictitious or fraudulent as well, then there has to be some agreement or litigation on what those terms mean. They -- they put it in their instruction and, you know, I think that that's something that would need to be addressed.

The other point that I did think is worth at least flagging for the Court is we have argued and cited cases that a statement is false only if it's false under every reasonable interpretation of the question, and Mr. Craigue's statement about Mr. McKenna's status was false only if it was false under every legal definition of the term employee.

So those are other things that are out there. I just wanted to make sure the Court is aware of them.

THE COURT: Okay. All right. That -- that -- raising the first one, that seems like something you can meet and confer on as well and perhaps propose a resolution for me on that?

MR. DAVIS: Yes, we can, Judge.

THE COURT: Let me know.

Okay. And then with respect to every reasonable interpretation of the question, I think that overlaps a little bit with this next *Darden* question, so maybe we can move into that and -- and I can get a sense of the arguments, the scope of the argument, and maybe give you a sense of where I would go with that.

All right. As much as I think when I first learned about the case resisted the idea that I would have to tell the jury all the *Darden* factors -- I think you'll recall me asking Attorney Davis, are you serious, you really want me to give that to the jury -- I've come to the conclusion, I think, based on everything that I've read about it that ultimately I do give them, essentially, the common law on the factors.

I am not persuaded that I need to give them every single possible statute that's involved. I think as the defendants argue and you list in your proposed jury instructions that I should give them the Occupational Safety and Health Act, OSHA, Fair Labor Standards Act, Internal Revenue Code, worker's compensation law. And I've obviously looked through those codes. It seems to me that I'd look at OSHA, the context in which this case happened, and OSHA I think uses the -- basically the *Darden* common law test.

And I am not exactly sure on how I would word the *Darden* factors, but I think I would -- I'd be very careful about commenting, or at least looking like I'm commenting, on the evidence specific to this case and try to explain to the jury how the *Darden* factor -- factors work in a general sense, that control is the key. And I might, you know, give some examples and use, for instance, some other sort of hypothetical worker, employee/independent contractor relationship like maybe a housecleaner, for instance, that would not necessarily be a contractor or something close to this case, but just giving them a sense of the types of things you would look at to determine whether or not somebody's an employee or independent contractor and give it to them in a very general sense: Here are some examples of control, the things you might consider; here are some things that might show that a housecleaner is an independent contractor as opposed to an employee.

That's my thinking, having read your submissions. And so tell me -- tell me why I'm wrong on that, Attorney Mirhashem.

MR. MIRHASHEM: Thank you, your Honor. I mean, I certainly agree that with respect to the *Darden* factors instruction, the law is very clear that when it comes to general instructions such as that one, the

Court has a lot of discretion on how to word the instruction. And we're certainly not saying that you must instruct them exactly using the words that we have used. So right off the bat we acknowledge that.

But as far as how you word it and why you tell them about the other instructions, let me just explain a few things from our point of view.

The first thing is -- so the facts are that the government alleges that Mr. Craigue, you know, in statements that he makes to the OSHA investigator, refers to Mr. McKenna as being an independent contractor when he knows that Mr. McKenna is an employee. Okay? So that's the -- that's the -- that's the heart of the case, obviously.

So they have to prove that the statement essentially -- I paraphrased here, he's an employee -- he's an independent contractor, I'm sorry -- was false and that he knew it was false. Okay?

So what you have to do is you have to consider an individual like Mr. Craigue, untutored in the law, and decide -- the jury has to figure out how are we going to decide whether his statement was false and he knew it was false. Okay?

So then you've got this mass of law, which the government has just brought on a third lawyer with a

labor lawyer background to kind of digest and explain. And this complexity -- it would be highly unfair to Mr. Craigue to bury because it was in the face of this complexity that he was talking and now the government has chosen to criminalize his response on a complex question where companies have armies of lawyers figuring these things out.

So if you tidy it up, give a really simple instruction to the jury just focusing on, you know, what may have been in the OSHA investigator's mind, there is a lot that's lost here.

As a small businessperson, Mr. Craigue had to deal with does he have to pay taxes for these people, does he have to get workman's comp for them. These different statutes that we've cited aren't statutes that we just pulled out of the air. Those are -- in fact, the government is arguing, oh, his motive to lie was he didn't want to pay workman's comp, he didn't want to pay taxes. Well, the *Darden* factors don't determine that. New Hampshire worker's compensation law determines that. The tax laws determine that.

So you have somebody sitting there making a statement. There are multiple relevant bodies of law that are in the air when he responds to those questions. And so the jury, having had heard all the evidence and,

of course, the 404(b) motion is down the line, but the government -- the government wants to get into workman's comp. The government wants to get into tax obligations.

Well, if we're going to get into those things, all the more reason -- but regardless of whether or not you get into those things, the jury has to understand what they think Mr. Craigue knew when he was being questioned about these things. So that's why the other ones are highly significant here.

With respect to the *Darden* factors, I mean, the government in its instruction tries to oversimplify it, saying that it basically comes down to like one test which is determinative. And our problem with that is that's inaccurate. You know, the simpler you make it, the more it helps the government. They can just point to one thing and say, look, he didn't do X -- you know, he knew X, therefore, he's guilty, he knew that he was making a false statement.

But the reality of it is the law in this area is very complicated. I mean, we don't have a labor lawyer on our team, so Attorney Graham and I actually conferred with a labor lawyer. And the thing that we keep hearing is this is very complicated. There is one answer under OSHA law, one answer under labor, you know, wages and hours law, one answer under tax law, one

answer under New Hampshire worker's comp law.

I mean, they're trying to really push the envelope in this case by making a criminal case out of a dispute over compliance with regulations. They -- they've convinced the grand jury to bring this indictment, so that's within their right, but the Court should let us present to the jury the full complexity of the law in this area in fairness to Mr. Craigue and what he was up against when these -- you know, when the government bureaucrats were asking him, they knew the law with respect to OSHA. The issue is what could the jury conclude was this average person's understanding of it. That's sort of the big picture of getting into these other things. You know, workman's comp is a totally different test from OSHA.

So that's sort of the general background why we think these other instructions are critical. You know, the -- OSHA is all about control. The Fair Labor Standards Act is about economic dependence. The Internal Revenue Code is about right to control as to details and means. Worker's comp, the last provision of it, says, you know, you look at whether or not the person is required to work exclusively for the employer.

These are all very different standards and if Mr. Craigue's statement was true under any one of them,

then it wasn't a false statement. This is how it ties to the elements. But even more crucially, if he believed his statement was true under any one of them, you know, he's not guilty of a federal felony.

I mean, this is -- they want to say you go talk to a government investigator, you get it wrong, you get convicted of a federal felony, you can go to federal prison for getting something highly technical wrong in your answer.

To prove that, the jury needs to see the complexity. I mean, if you simplify it, you take away our defense, basically. So that's what --

THE COURT: Let me ask you this. Let me ask you this.

So the government has the burden of proving the element of falsity beyond a reasonable doubt. All right? And I think what you're arguing goes to his knowledge, the knowledge of its falsity. But -- and maybe that's fair game as to knowledge and the knowledge element.

But in terms of instructing the jury on that element of falsity, I -- I'm inclined to give them the instruction with -- which would apply, the OSHA act, which would be a *Darden*-like multifactor instruction.

But as to knowledge, I think clearly that's an

argument that you make for the -- in front of the jury. I'm not sure exactly how that -- how that gets played out and obviously we'll have to hear argument on that. But in terms of falsity, in my instructions to the jury I've got to be able to explain to them how the government meets its burden with respect to falsity.

So let me hear from Attorney Davis on that and obviously, Attorney Mirhashem, I want to hear your response as well.

MR. DAVIS: Judge, we agree with essentially everything you said on this issue.

Just to respond briefly to one thing defense just said, the defendant said that the government wants to simplify this and make it about one issue. But that's not true, and I'd point out that the last sentence of our proposal is -- or the last paragraph is: You should consider all the circumstances surrounding the work relationship. No single factor determines the outcome. Nevertheless, the extent of the defendant's right to control the means and manner of McKenna's work is the most important factor.

And that's right out of case law. So we're not saying that a single factor is determinative. But beyond that, your Honor, I would say several things.

First, as the Court recognizes, this is a

common law definition. It's a -- it's evolved over time. It's the basis of the OSHA regs. It's also the basis of the state worker's comp regime, I believe.

And -- and so proposing that the Court instruct the jury on the common law of a question of agency, which is what this is, there's nothing strange or weird or deceptive about that. That's what courts do every day and the Court would be -- would need to do in this case.

It's a common law issue. OSHA applies the common law. And *Acosta*, the First Circuit case from 2018, clearly says just that; this is the common law definition with a bunch of factors and we totally agree that there's no getting around explaining multiple considerations as *Darden* does.

Where we strongly part ways -- and I guess one other thing I'd say is although this seems to the defense and perhaps to us prosecutors as a -- as an arcane and very unusual area of the law, I'm sure in civil cases it isn't; that is, there are lots and lots of labor management cases litigated federally and jurors are instructed all the time on questions like this in civil trials. So, again, the novelty of it for criminal prosecutors doesn't mean that somehow it can't be done or there's something wrong with doing it.

But getting to where we part ways with our esteemed federal defenders is that it would be hopelessly complex and Byzantine to saddle the jury with four different definitions, or at least apparently different definitions, to tell them implicitly that all of these are relevant to what you're thinking about and you have to figure out how they apply in determining falsity.

The Court shouldn't do that. The jury would not be properly instructed. I can't imagine being a juror in this trial where that's the instruction you get and I just don't think that that works.

I do think that it's certainly possible that -- and the Court alluded to this at the end. It's certainly possible that a factual predicate could be made that some difference in some other statutory regime about this issue, some difference exists and is material and also was actually known to the defendant or considered by the defendant or misapprehended by the defendant and that that predicate could be shown, potentially by testimony, potentially by expert testimony, so that the -- maybe the defense argument is there is this material difference in what -- in the distinction between employee and independent contractor that is in the IRS statute and for this reason, the

defendant had contact with some tax accountant at some point who advised him of the following and he had that in his mind and was misled by it.

And that could happen and that could be a basis for a knowledge defense, but as the Court just said, that's a question of fact. It's a matter of evidence. And until there is some evidence that distinctions between the four different things the defendant is putting in front of the Court -- distinctions exist and are material and actually are relevant in this case as the Court determines knowledge, until -- until that is shown, there's some predicate, there's no reason for the Court to say -- to try to find every possible legal definition. I'm sure there are probably more. There are probably other regs similar to those that the defense could say, well, these are also possible and to try those out and make the jury get an instruction on all of them, particularly where for most of them, the basic principles are the same and most of them are derived from common law agency.

So, anyway, we -- this would be hopelessly complex. We strongly oppose it. We think the Court can do properly, as courts do in civil cases, an instruction about agency based on *Acosta*, based on *Darden*, based on the common law, and that's exactly what the jury needs

in terms of a jury instruction and the rest of it is fact and evidence and argument.

That's it.

THE COURT: Thank you.

Attorney Mirhashem.

MR. MIRHASHEM: Thank you.

Your Honor, where we agree is *Acosta*. *Acosta* -- we both cited it on the *Darden* factors and I completely agree that the Court has to take *Acosta*, our proposal, the government's proposal, and draft a fair instruction on the *Darden* factors. That I agree with.

Where we disagree -- and, you know, this case, it's like a gordian knot because all of these things are connected to each other and this issue is connected to what we were just talking about about the instructions and the 404(b) issues.

Let me just bring your attention to footnote 6 of our instructions. This is on the elements where we claim that you have to look at every reasonable interpretation of the question.

I have two quotes there, one from the First Circuit: In a false statement prosecution, an answer to a question is not fraudulent if there is an objectively reasonable interpretation of a question under which the answer is not even false.

So it doesn't go just to knowledge. If there's a reasonable interpretation of the question under which the answer is not even false, then, you know, you're not guilty.

So the question is, you know -- you know, Count Two of the indictment is about the October 25, 2018, recorded interview of Mr. Craigue with OSHA. About ten days earlier, he was at a hearing at the state Department of Labor Workman's Comp, October 15, 2018, if I have my dates right. So it's perfectly reasonable that he may have been thinking about the definition under workman's compensation law.

THE COURT: How is it materially different, that definition?

MR. MIRHASHEM: So one -- as I said, if you look at the -- if you look at the New Hampshire definition, the New Hampshire definition sets up a presumption that somebody's an employee, but then it says the presumption may be rebutted by proof that an individual meets all of the following criteria. I'll focus on the last one: The person is not required to work exclusively for the employer.

So if you're hiring someone who is not required to work for you exclusively, can work for other people, that, along with other factors, can result in

overcoming the presumption that the person was an employee.

So it's just -- I mean, it is complicated. I --

THE COURT: Yeah, but McKenna worked for other people?

MR. MIRHASHEM: I don't think the government has evidence that he exclusively worked for Mr. Craigue. I mean, he was a -- I --

MR. DAVIS: Our evidence is he only worked for Mr. Craigue. I'm not aware of any job -- I don't -- I don't rule out the possibility.

MR. MIRHASHEM: May I ask -- Mr. McKenna's deceased. How does the government intend to prove at trial that Mr. McKenna exclusively worked for Mr. Craigue?

MR. DAVIS: Well, Mr. Erickson worked with him for two years with -- on jobs for Mr. Craigue, the defendant.

MR. MIRHASHEM: The jury doesn't have to credit Mr. Erickson, whose credibility is subject to, you know, multiple motions that are before the Court.

But, I mean, this is --

MR. DAVIS: Anyway, yeah.

MR. MIRHASHEM: I mean, I'm just saying, you

know, again, the Court has a lot of discretion in how it fashions the instructions, but -- this was an OSHA investigation, but that -- it doesn't logically follow from that that in determining whether a statement was false, you only look at the law that applies to OSHA.

I mean, OSHA law may have been in the investigator's head; that doesn't mean that OSHA law is objectively controlling on the issue of the falsity of a statement or that Mr. Craigue somehow knew, oh, when I'm answering this question, I've got to, like, be aware of the *Darden* factors. I mean --

THE COURT: Okay. Let me ask you this. And maybe this would be Attorney -- somebody with an expertise in labor law.

But why wouldn't exclusivity, working exclusively, why wouldn't that also go to the *Darden* factors? Why wouldn't that be a *Darden* factor?

MR. GINGRANDE: I'll just --

THE COURT: It makes sense to me. It's consistent with *Darden*. It's consistent with the notion of employee versus independent contractor.

MR. GINGRANDE: Your Honor, if I could respond to that.

First of all, one thing that I wanted to -- I agree with you that it would go to both and the

fundamental point to be made here in this argument about exclusivity and the definition that Attorney Mirhashem has quote -- is referencing is that the presumption that someone is an employee under New Hampshire worker's compensation law is only rebutted if all of the following factors that are listed in the -- in that definition of independent contractor are met, not just the one, not that it's -- the person worked exclusively for -- for the employer or did not work exclusively for the employer.

There are five -- or six, I'm sorry -- six other factors that would have to be met in order to prove that the person is, in fact, an independent contractor, including things such as a person possesses a federal employer identification number, the person has control and discretion over the means and manner of performance of work. You can see the overlap even just in that last factor alone with the *Darden* factors.

So it is not as simple as, you know, saying that, you know, if the person did not work exclusively for the employer that they are, therefore, an independent contractor.

MR. MIRHASHEM: Your Honor, we agree it's complicated. What we really are pressing is an instruction that makes the jury, in judging Mr. Craigue,

aware of the complexities. That's really what we're asking for here is this is a complicated area of the law.

I mean, maybe the Court could say there are multiple definitions of the term independent contractor under this law, that law, that law. We're not -- I know that we're not entitled to a particular form of instruction, but we are entitled to an instruction that makes the jury aware of what a complicated legal question this criminal prosecution turns on.

That's the crux of our defense. That's what fairness to Mr. Craigue really demands. Now they want to oversimplify this case and say, oh, look, you know, he didn't do X; therefore, he's guilty.

Here's a man sitting there without counsel, without advice that he can be prosecuted based on his false statements, series -- you have the transcript of the questioning. Series of questions where the questioner knows what he wants to get. Mr. Craigue doesn't know. The government wants to like proceed in the fashion they are. We're counting on the Court to make this fair such that the jury can see the full complexity of what was going on as Mr. Craigue was having to answer all of these questions.

And in a really crucial way, it all comes down

to, well, so what is an independent contractor? I mean, it's bizarre, because I've never had a criminal case that remotely comes close to turning on something like that. Criminal cases are did you hit the guy on the head, did you do this, did you do that. No, we're going to make you a felon based on did you make a false statement when you said the guy was an independent contractor. Well, if you're going to make him a felon based on that, you've got to dot your Is and cross your Ts. That's really the framework in which we are approaching this case.

THE COURT: All right. So you're looking for some sort of generalized instruction to the jury that this is a complex legal question, here are the factors you need to weigh in deciding it, and then go through the *Darden* factors. That would satisfy you. Something along those lines?

MR. MIRHASHEM: We're asking for the instructions we're asking for, but I'm saying if the Court is not willing to give us that, at least it shouldn't just give an oversimplified version of the *Darden* factors, but in some other fashion. I mean, if the Court, you know, has a draft instruction, we would certainly, you know, appreciate looking at it and seeing if it really fairly brings out this key issue of just

how complex this area of the law is. I mean --

THE COURT: But it's complicated -- I'm familiar with this area of the law, having had cases, civil cases. It is complicated. It is a balancing test of many different factors. Anyone familiar with this who says it's not complex, it's just simple and easy to decide, is not correct in my opinion.

So it is a complex area. It involves balancing many different factors. But ultimately I'm going to be giving the jury those factors, so the jury is going to have to weigh those factors and you get to argue in your closing argument, look at all the factors you have to weigh in order to decide this question.

It seems as though something that is ripe for argument, especially on the prong of what he knew, what he understood, the judge is asking you to find these factors, decide these factors, you get to weigh all of those things, you heard evidence -- and you'll argue back and forth on that.

But ultimately I think it's self-evident that these factors involve a balancing test and it -- it's an argument that I think a jury's going to be sympathetic to.

But I don't know -- in terms of requiring the government to meet the element of falsity, I do not

think -- I'm not persuaded at least at this point that I need to instruct the jury as to each possible permutation of what -- you know, what the definition of employee and independent contractor is under all those different statutes. My guess is a *Darden* factor instruction that encompasses pieces of all of those would be -- would be a correct legal instruction.

So my inclination is that I give them the *Darden* factors and that ultimately you make an argument to me, Judge, you need to include more factors; you need to include the following factors. Because, you know, all of that could have been running through his mind at the time and falsity as an element requires the jury to weigh this other *Darden* factor.

Those are loose factors, at least my understanding. Some of them, it's not obvious to me where the person worked, location. How is that particularly relevant in a *Darden* balancing test?

So I think what I would do at this point is draft an instruction on this and then have -- you know, have another, obviously, attempt at argument with respect to my draft or my proposed instruction. I tend to do that in every criminal jury trial, give that to lawyers before, even sometimes before we pick the jury, so you know the scope of the evidence in terms of the --

in terms of the jury instructions.

But I'm telling you my inclination is to give them the *Darden* factors and I'd be open to arguments as to additional factors that should be included in that balancing test. But I do think it's fair game for you to make that argument to the jury.

I don't know that I agree I instruct them that they have an impossible task here. That -- that does not -- it seems to me I need to tell them what the government has to show to prove the element of falsity. And then with respect to knowledge, obviously that's where I think the heart of the case comes down.

But that's what I'm thinking at this point. And having said that, is that something -- I'm not persuaded that I give them every possible permutation. I'm persuaded I give them the *Darden* factors. As I say, I'm open to persuasion with respect to adding to the factors.

Is that something that a meet-and-confer and propose a *Darden* factor balancing test instruction -- does that make sense also to add to our list of things that you could jointly propose?

Don't get me wrong. You are preserving your argument here and you are making the argument that I should include every possible reasonable construction

which would include, you know, all of the different statutes that you cited in your proposed instructions. I do not think that is what I do here. I'm not persuaded, but I want, you know, to be clear that argument is preserved.

Having made the argument and having heard my inclination, I think it might behoove counsel to meet and propose a *Darden* factor type instruction which might include, for instance, exclusivity as a factor. As Attorney Gingrande just said -- I know I just pronounced your name -- mispronounced your name. I'm sorry.

MR. GINGRANDE: No --

THE COURT: Was it close?

MR. GINGRANDE: You got it right. You got it right.

THE COURT: Okay. Well, he just said that exclusivity does -- does fall under a *Darden* factor test. So it seems to me that I might throw this back in your camp and ask you in accordance with *Acosta* to come up with *Darden* factors that work. Obviously around the edges you may disagree and I'll resolve those disagreements and you just make it clear to me where you do disagree.

But my inclination is on the element of falsity that I give them a *Darden* instruction.

MR. MIRHASHEM: I understand the Court's ruling.

THE COURT: All right. And you're okay with adding that to the meet-and-confer and perhaps a proposed instruction?

MR. MIRHASHEM: Sure.

THE COURT: And the sooner you get that to me, the sooner I can get to you my proposed jury instructions in total.

Okay. Is there anything else with respect to this *Darden* factor question that I need to address right now? I think what we'll do is we'll just take a brief break for our court reporter and then come back and we'll go through the motions in limine one -- one at a time, #1, #4, and #5.

MR. MIRHASHEM: Okay.

THE COURT: Anything else, though, before we let our court reporter take a break?

MR. DAVIS: Nothing further on the *Darden* issue, Judge.

MR. MIRHASHEM: Not from the defense.

THE COURT: All right.

All right. Let's do this. Let's reconvene at 25 minutes before 11:00. That gives us ten minutes.

So if you just turn off your video and your

audio, we can just come back and all of us turn that back on in ten minutes. Does that work for everybody?

MR. MIRHASHEM: It does, your Honor.

THE COURT: 10:35? Okay. All right. Good. I'll see you in ten minutes then.

(Recess taken from 10:24 a.m. until 10:40 a.m.)

THE COURT: Okay. It looks like we're all back on the record.

Okay. All right. Now, these are three motions in limine. They are motions by the defendant. And what I would say about these motions and my rulings is that I'm going to give you a provisional ruling. I'm going to tell you how I am -- you know, my instinct; if the evidence comes in as you suggest, here is how I am going to rule.

If the evidence comes in differently, obviously then it shifts the ground and changes a ruling potentially, so I qualify my rulings only by that, to that extent. Obviously in a trial it's much easier to make these decisions and final rulings when I hear the evidence and I know what the evidence is. But I tried cases and I know it's helpful to have a sense of what the judge is likely to rule on some of these disputed issues.

So I will give you my ruling. It's

provisional and it depends -- hinges on whether the evidence does come in as I'm anticipating it will. And I'll obviously tell you how I anticipate the evidence to come in based on what you've argued and you can clarify for me as we go.

So let's start with Motion in Limine #1. Now, this one is the motion regarding any opinion testimony regarding employee versus independent contractor. Since the motion's been filed, it's my understanding that with respect to -- and this is Motion in Limine #1, document number 35.

With respect to the argument that the Court must exclude all testimony on the law that applies to determine whether a worker is an employee or an independent contractor, the government concedes there's not going to be testimony on the law distinguishing an employee from an independent contractor. That's going to come in my jury instructions. And so the -- the government concedes that testimony on the law is not going to be admitted.

Am I correct on that?

MR. GINGRANDE: Your Honor, yes, it's correct that there will be no testimony as to the legal definitions of the term employee and independent contractor.

You know, frankly, we read defendant's motion to be a little broader than that in terms of excluding testimony on the distinction itself and the consequences of the distinction or significance to the distinction and both of those things is -- are categories of evidence that we do think should come in.

THE COURT: Okay. So essentially you're saying -- agreeing there's not going to be testimony specifically on the legal standard to determine employee versus independent contractor, but it doesn't --

MR. GINGRANDE: Correct.

THE COURT: -- prevent the government from seeking to introduce evidence of the fact that there's this legal distinction.

MR. GINGRANDE: Correct.

THE COURT: Okay. All right.

Do you disagree with that proviso?

MR. MIRHASHEM: Your Honor, I'm honestly confused by exactly what the government wants here because they keep saying they -- this is mostly moot.

So I look at their conclusion where they listed four things, and the first one is the legal distinction between an employer's classification of its workers as employees versus independent contractors. And, I mean, I guess if legal distinction means here's

what one means and here's what the other means, obviously we object to that. If it is that there is a distinction, well, the Court's going to instruct on here's what -- here's the test for the distinction.

So I honestly -- I just want to understand by way of a proffer what the government wants to introduce here when they say they want to introduce evidence on the legal distinction, item number 1 at the four-item list. I don't understand what that -- what they want to introduce. My suggestion would if we could have a proffer on that, then we'd be able to say whether or not there's a disagreement or not.

THE COURT: Go ahead, Attorney Gingrande.

MR. GINGRANDE: Thank you, your Honor.

I -- yeah, I would respond by saying just what I said before: That the government would intend to introduce the fact that there is a distinction between an employee and an independent contractor; that this distinction is significant to OSHA, which is a required as part of this case because it shows the materiality; and, of course, the reasons that it is significant to OSHA, all of which both showed the materiality element of the crime, but also speak to whether or not, you know, he would have a motive to lie about how his employees or independent contractors, as defendant would

argue, were classified.

We would not introduce any evidence of, you know, this is the standard, these are factors you have to apply in looking at this analysis, and try and usurp the Court's role in any way.

And, you know, I would also say if -- you know, if Attorney Davis or Attorney Dronzek, you know, have any corrections to make to that, they can feel free to chime in, but that's my understanding of what the three of us have agreed that would be introduced.

THE COURT: Is that clarifying, Attorney Mirhashem?

MR. MIRHASHEM: Your Honor, so I -- I mean, on the first point, I mean, if some OSHA witness is going to say employee and independent contractor are two different things and leave it that, I mean, the Court's instructions are going to make that clear. But, I mean, I don't have an objection to that statement.

On the significance of the distinction, I guess whether or not that falls within our motion, it depends on what they're going to say. I mean, the government has said they're not offering any expert testimony and so I don't know exactly what they're going to say. If they're going to be describing the legal distinction between an employee and independent

contractor -- I mean, I just don't know. What is the significance of the distinction for OSHA's investigation to the extent that it may possibly fall within what we have moved to exclude in Motion in Limine #1. I mean, we don't --

THE COURT: Okay.

MR. MIRHASHEM: -- need opinion testimony on the distinction.

THE COURT: Right. Right. I think this is just a fine line we're going to have to draw very carefully and sharply during the trial, but I don't see how they prove their case without putting on some evidence of the distinction between these two things. It is the case.

So I -- I do think that the government understands that I'm going to give the instruction to the jury so that I will tell them the legal difference and ask them to decide which he was as a matter of fact under the falsity element, but ultimately I think I grant your argument one in the Motion in Limine #1 and I think the government concedes that there's not going to be opinion testimony on independent contractor and employee.

So to that extent, you know, Motion #1 is granted. However, just to be clear, it doesn't prevent

the government from seeking to introduce evidence that there is this distinction. It just excludes testimony that would provide the jury with the law used to make such distinctions.

So that's how I am likely to rule on argument 1, assuming the evidence comes in as such, and I give you that ruling now. And you, I think, are better equipped to know what the law will be. And I make clear to the government that obviously I'm saying it doesn't prevent you from seeking to introduce evidence of the fact of the distinction, but I think you understand where the line is.

But this may come up at trial and obviously make an objection and approach the bench or use your audio headphones, if we still are engaged in that.

All right. Now, argument number 2, everybody agrees there's not going to be expert testimony on the question of whether McKenna was the defendant's employee; is that right?

Okay. I'm not hearing anybody on that. Is that correct, everybody agrees no expert testimony on whether McKenna was the defendant's employee?

MR. GINGRANDE: You're right, your Honor, that's correct. Sorry. I must have glitched a second with my mute button.

Yes, the government will not be introducing experts.

THE COURT: Okay. And the defendant's motion then is granted to the extent it seeks to exclude expert testimony as to whether McKenna was the defendant's employee.

All right. Now, argument 3, this one's a little trickier.

MR. MIRHASHEM: Can I just say something about that? I'm sorry, your Honor. I may have misheard. But we're objecting to opinion testimony, lay or expert. I don't know if the --

THE COURT: Yes, I just was -- I was just capturing the areas where you agree.

MR. MIRHASHEM: Oh, okay.

THE COURT: So now we're moving into the area where you disagree and it's a little trickier.

So argument -- your last argument, at least the way I've broken these arguments up, is that you're asking me to exclude lay opinion testimony or evidence as to whether Mr. McKenna was Mr. Craigue's employee.

So, now, the facts that people observe -- let's say Mr. Erickson observed certain facts like Mr. McKenna carries his own tools to the site, Mr. McKenna worked on his -- his own time, that kind of

fact. That you're not suggesting should be excluded, just opinion testimony from, say, Mr. Erickson that I think Mr. McKenna was Mr. Craigue's employee.

MR. MIRHASHEM: Yes, your Honor, observations of a witness about facts that bear on, say, the *Darden* factors, we are not objecting to.

THE COURT: Okay. Now, what about the possibility that the government has statements of -- statements of Mr. McKenna perhaps that would be admissible about his own understanding of what he was? I'm not suggesting they do, but if -- if it were admissible and fell under a hearsay exception, one of the *Darden* factors, I believe, is whether or not the person working -- the employee, independent contractor, the worker -- and the employer, what -- what they thought, I believe is one of the *Darden* factors.

So under that scenario, if there are statements of McKenna, assuming they come in under a hearsay exception, do you agree that those would be admissible?

MR. MIRHASHEM: If I could just have a moment.

THE COURT: Same for maybe statements of Mr. Craigue, to the extent there are statements to that effect. So answer both of those.

MR. MIRHASHEM: I mean, I see it different --

I mean, Mr. Craigue -- if they have statements where Mr. Craigue said McKenna was a employee, okay, that I agree is -- is admissible if otherwise admissible. It's not barred by the general objection we've made to opinion testimony. I mean, you know, depending on what the statement is, I mean, a 403 objection, if there's some layer -- obviously his own statement directly is not hearsay, but somebody said Mr. Craigue said -- I mean, there could be evidentiary objections, but the -- I agree that the fact that it was an opinion of Mr. Craigue's does not make it admissible because it's probative of his knowledge of the falsity of his statement, regardless of whether or not it was an accurate opinion.

So -- so the answer to that question is yes, I agree that if otherwise admissible, Mr. Craigue's own statements are admissible.

THE COURT: And what about McKenna?

MR. MIRHASHEM: McKenna --

THE COURT: If they have such statements.

MR. MIRHASHEM: I think that McKenna, if they have such statements, it's still just a lay opinion like any other lay opinion. I mean, why -- I mean, what I was doing was I was trying to look at the *Darden* factors to see which one the Court was referring to because

that -- otherwise, it seems to me like it's just a lay opinion testimony.

You know, somebody who's working for someone, their opinion of their employment status, I don't see why that would be treated any differently unless, as you said, there's something in the test that treats that differently, and I haven't found that.

So I would --

THE COURT: I thought it was in the Restatement (Second) which *Darden* says I am supposed to look to to -- for the common law and the factor would be what did the two individuals think; not just the employer, but what did the worker think. I could be -- that's my understanding.

MR. MIRHASHEM: And I'm looking at our proposed instruction and the government's proposed instruction and at least in those two, I don't see some -- I'm sure your Honor is correct about the Restatement (Second) that I have to confess ignorance of here, but I don't see it in our proposed instruction and, I mean, it seems to me like it's a lay opinion as to a -- a matter of law.

So --

THE COURT: I think there's a First Circuit case as well that lays this out and draws from the

Restatement (Second). It's *Saenger*, S-a-e-n-g-e-r, *Organization, Inc.*, and it's 119 F.3d at 61.

Let me just say this. To the extent the *Darden* factors make the two of them and what they thought relevant factors, then I'm inclined to say it's -- he's not just another layperson; he is a layperson whose opinion would actually be a factor under *Darden*.

So I would be inclined -- to the extent the government even has such information and to the extent it would meet, you know, the hearsay objection and prevail on that, that I'm -- I would tend to think it would come in, you know, assuming it is a *Darden* factor.

MR. MIRHASHEM: I understand.

THE COURT: Okay. All right. Now, if it's not a *Darden* factor and I'm wrong about that, obviously I would revisit that.

Now, with respect to anyone else giving their opinion, their lay opinion, I am inclined to believe that that's just completely irrelevant, what some person thinks about Mr. Craigue and Mr. McKenna. I'm -- I'm inclined to think that that is completely irrelevant.

The only area where I'm wondering, and I'd like to hear, perhaps, from both counsel on this, is the area of Mr. Erickson and -- you know, I just don't know

how the evidence would come in, but if Mr. Erickson -- if there's testimony that Mr. Erickson and Mr. McKenna were identical or substantially similar in terms of the way in which they worked for Mr. Craigue, then I could see possibly it being relevant at that point.

So I'll let counsel give me their thoughts on that, Attorney Mirhashem and then Attorney Gingrande.

MR. MIRHASHEM: Your Honor, I mean, I would say that I see why the Court is -- is thinking that Erickson's opinion on that issue may be relevant. I'm not going to focus on that. I'm going to focus on even if relevant, because it's opinion, it has to meet the more demanding standards of Rule 701.

So Rule 701 requires more than just mere relevance and I think that Erickson's opinion would not meet those factors because, first of all, obviously it can't be specialized knowledge, so we've got to exclude that. It has to be helpful to clearly understanding the witness's testimony or determining a fact in issue.

And I don't see why it's -- you know, Erickson testifying to McKenna would, you know, not bring his own tools or McKenna worked, you know, only on this job, as the government said. Those are facts, and I concede those are relevant, but why is then this layperson going on to offer an opinion on this issue helpful to clearly

understanding, say, his testimony about these matters we just talked about or helpful to determining a fact in issue.

I mean, I would argue it's harmful to have this layperson come in and just say, you know, in my opinion, McKenna was an employee, or in my opinion, I was an employee -- I'm not sure which one we're talking about here -- I don't think that those are helpful and I further don't think that they're rationally based on his perception because he would -- he can say what he observed, what he heard, but to reach some sort of legal conclusion from that, I don't think that that's appropriate.

I would also say, you know, to the extent that we're talking about relevance, then we also need to consider Rule 403. And I think that whatever marginal probative value such evidence must have -- might have is -- is substantially outweighed by the unfair prejudice that the jury's going to think, oh, this guy was there, you know, he must be right when he says that such and such.

So I -- our contention is to the extent such evidence exists, it is inadmissible under 403 and 701.

THE COURT: All right. Let me hear from Attorney Gingrande on this. And I'm not sure you've

advocated that you would, indeed, move to admit that kind of opinion testimony and maybe you wouldn't, but it seems to me the issues under 701, whether or not it would be helpful to clearly understanding Erickson's testimony or determining a fact in issue, it's clearly, I think -- he's got to meet 701(a) and (c). It's not based on scientific, technical, or other specialized knowledge. He certainly would fall under (c), rationally based on his perception. That's really almost a foundational question, just is it helpful to the jury. And I think I could -- I could be persuaded to limit this just to testimony about -- from McKenna, statements of McKenna, opinion statements, opinion statements of Mr. Craigue, but no one else.

However, obviously Mr. McKenna -- I mean Mr. Erickson -- is going to be, I think, a key witness for the government, is going to get on and tell his story. So clearly the facts that would support, you know, his observations that are material in the case would be admissible, but why do I go that further step and then let him state his opinion of whether or not either himself or McKenna were employees?

MR. GINGRANDE: Your Honor, I think you've -- you've honed in on the issue here, which is, you know, whether or not this would be helpful to understanding

the testimony.

And here it is absolutely helpful to understanding the testimony from Mr. Erickson, especially where we don't have Mr. McKenna available to testify. Because as you picked up earlier, the understanding of the employment relationship is something taken into account when -- when making the determination.

Certainly no one would argue that if there was a contract that said, you know -- that X person is working for X person at, you know, X employer as an employee or whether it said it was as an independent contractor, that would be relevant. That documents the parties' understanding.

Similarly, if there was an oral agreement to that effect, there was some mutual understanding of the relationship, that is -- that is relevant.

And here where we don't have available to us the testimony of -- of Mr. McKenna, the -- the way that we can -- the way that the government is limited in discussing the relationship is with the employees who are available who can testify to that economic relationship.

I would just make one, you know, minor adjustment to the statement that you just made about

limiting it to McKenna and Erickson's relationship and also include Mr. Ford who was an employee, or at least in the government's view an employee, of Mr. Craigue as well.

But that is helpful to understanding all of the other evidence that the government is going to be bringing -- introducing and bringing into the trial regarding the facts about the economic relationship, who provided the -- the, you know, supplies, who determined the hours, how payment was made, et cetera.

And so --

THE COURT: Okay. Now, I agree with you on that. I'm going to allow facts about the relationship. But those two are not parties to the employment relationship between Craigue and McKenna, so my -- my feeling at this stage is that I would allow testimony from Erickson and Ford about everything they saw or observed about that employment relationship between McKenna and Craigue, but I am not inclined to go that one step further and say that their view of employee versus independent contractor, their view is -- is relevant and is something the jury has to hear. But I don't want to say, you know, I'm absolutely not going to admit that evidence. That's what I'm saying right now, provisionally, as I -- as I hear and understand this

case.

So this would be something I think if you're inclined to ask Mr. Erickson or Mr. Ford the question, what did you think Mr. McKenna was, an employee or an independent contractor, then you might want to approach and we'll just argue this issue.

But my instinct right now is that 701(a) and (c) are met, but I have trouble with (b). But maybe I won't for all the reasons you're saying once I hear the evidence and I feel like this is something the jury -- is worthy for the jury to hear and it would be helpful to them. But, ultimately, I'm not -- I'm not seeing it yet.

Now, let me ask you this. Is Mr. Erickson -- I know we're going to get into 404(b) issues. I know we also have some issues regarding Mr. Erickson in these motions in limine.

Is he right now getting his painkillers through worker's comp? Is he getting it -- is he benefiting in any way by himself being deemed an employee? That's my question.

MR. GINGRANDE: Your Honor, that is something that I would -- I would defer to Attorneys Dronzek and Davis on. I'm not -- my understanding is that he is not currently, but -- but perhaps they could address that if

I'm wrong. And if there's silence --

THE COURT: The reason I ask it -- and, again, the reason why I'm asking it -- and Attorney Davis is muting his mic, I think.

Let me just ask -- I'm envisioning a line of cross related to that because if, in essence, Mr. Erickson would have a motive to portray himself as well as Mr. McKenna as employees because he would somehow get free access to the painkillers he needs through some sort of insurance, that would seem to me to be a motive that the defense counsel would want to explore. But, again, I -- I don't know what the evidence would tend to show on that and I have no idea if that's a line of cross the defendants would even want to touch.

So let me ask Attorney Davis that question.

MR. DAVIS: Judge, I'm not aware of any employment relationship now between Erickson and Mr. Craigue. I believe the company's out of business. Bankruptcy has been declared. I'm not sure if there's pending litigation between Erickson and the Craigue business. And perhaps Ms. Dronzek knows, but as far as I know, there's no current incentive along the lines the Court described.

THE COURT: Okay. And I don't think the

defense has argued it, so it was just a simple factual question for me to understand the scope of any evidence that Erickson would likely testify to.

So I think I'm going to stick to my provisional ruling here that, in fact, every bit of evidence that they observed that's relevant to the question of employee and independent contractor is admissible. I'm not clear that their opinions meet 701(b) and are helpful to the jury.

With regard to --

MR. GINGRANDE: Your Honor, may I ask a quick clarifying question about that?

THE COURT: Let me just finish my provisional ruling.

MR. GINGRANDE: Oh, okay.

THE COURT: And I know you know this, just for the record.

And McKenna and Craigue, to the extent there are statements of opinion, I think that those would be admissible under the *Darden* factors. So that's my provisional ruling.

Go ahead, Attorney Gingrande.

MR. GINGRANDE: I'm very sorry, your Honor. I think I was --

THE COURT: That's okay.

MR. GINGRANDE: I was trying to get to that last point that you were making.

I wanted to just clarify whether you're saying that Mr. Erickson's opinion as to whether Mr. Erickson himself was an employee would be admitted.

And the reason that I ask that is that there are -- there's a line of cases in employment law discussing -- and this'll come up in 404(b), but "me too" evidence, essentially, that discusses the -- how the policies -- when an employer has uniform policies that effect different coworkers, you know, in an organization, all employees, that evidence to one is admissible as to others. And we believe that Mr. Erickson's relationship with Mr. Craigue and the facts about that economic relationship are directly relevant to Mr. Craigue's economic relationship with Mr. McKenna.

And so as a result, whether or not there was an employment relationship between Mr. Erickson or, for instance, Mr. Ford and Mr. -- Mr. Craigue, we think is very probative of the relationship that Mr. Craigue had with Mr. McKenna as well.

So I just wanted to clarify what the -- what the opinion --

THE COURT: What my ruling is?

MR. GINGRANDE: Yes.

THE COURT: Yes. Well, my ruling deals with Erickson giving an opinion as to the employment relationship between McKenna and Craigue. And I believe that's the scope of the motion.

But I think defense counsel would object on the same grounds, to allowing Erickson to testify about his own belief as to his own relationship with Mr. Craigue.

But before I say as much, let me have Attorney Mirhashem weigh in on that.

MR. MIRHASHEM: No, your Honor, I agree with you that our motion is limited to opinion testimony about whether McKenna was an employee. Erickson raises a whole cluster of issues, some of which are dealt with in the 404(b) motion.

I mean, I would say that for all the reasons that we've talked about, I -- I don't think anybody can testify to their own or somebody else's employment status for the reasons I've argued. I mean, Mr. Craigue is different because he's charged with saying somebody is not an employee. So if there's a statement from him saying the person is an employee, you know, that's not admissible for its truth; it impeaches his other statement.

So we generally object to any other opinion testimony, but there's a lot that goes into Erickson that's going to be taken up on the 404(b) motion, so --

THE COURT: Okay. All right.

MR. MIRHASHEM: -- we're really just asking for the Court to rule on, you know, what Mr. Erickson may or may not be able to testify as to his own status because that raises a whole host of issues that are in our 404(b) litigation.

THE COURT: All right. All right. Well, Attorney Gingrande asked me the question, what's the scope of your ruling, Judge. So the scope of my ruling I think is clear. I'm just talking about opinion testimony with regards to McKenna and Craigue.

And rather than repeat my ruling, I'll -- I'll issue a very short procedural order that will summarize my rulings. I think you each are clear on my ruling with respect to Motion in Limine #1.

So let's go to number 4. All right. And number 4 is the DWI. I have an up-front question that I think is important.

Is this DWI resolved or is it still pending?

MS. GRAHAM: It's still pending, your Honor. I actually had my investigator check on that yesterday. It looks like Mr. Erickson is represented by counsel and

they requested a three-hour trial.

THE COURT: Okay. And this is a -- it's not just a run-of-the-mill DWI, a first. It's a third --

MS. GRAHAM: Right.

THE COURT: -- is that right?

MS. GRAHAM: Yes.

THE COURT: Okay. So having read everything you've submitted, let me just tell you my instinct on this and then have you tell me why I'm wrong. And this would go to the government.

How is this not bias? He's testifying at a time -- particularly if the case is still pending -- he's testifying at a time when there's at least this possibility -- I don't think there has -- it has to be proven, that -- you know, that it's the Concord P.D. and -- and you've got the government, U.S. Government, he's testifying here for as a key witness in the case.

I don't see how this isn't bias -- classic bias testimony and would -- you know, obviously you can rehabilitate and ask all kinds of questions about his original statements, but ultimately I think they get to ask about the pending -- the pending charge.

Now, whether that -- I think the fact that it's serious, it's a DWI third that would involve significant potential jail time -- again, correct me if

I'm wrong -- but clearly would go to his motive to want to testify in favor of the government. And I'm not sure that the jury has to know the exact nature of the charge, but, again, I -- I don't see -- I see this as just classic bias.

So tell me why I'm wrong, Attorney Dronzek.

MS. DRONZEK: Yes, your Honor.

So the issue here is that the statements Mr. Erickson will be testifying to are essentially statements that he made to OSHA long before anything came up with regard to this DWI, this DUI, which I also will note is also a -- it's a Class A misdemeanor. It's not a felony.

And the defense will have -- has access to all of Mr. Erickson's statements. They will have statements he made to OSHA when he first voluntarily reached out to OSHA of his own accord. They have statements that he made to the grand jury. And, you know, those were all made long before this -- this arrest came about.

And the motives that he has for -- I think the motive that he has for testifying is so clearly rooted in prior actions, prior statements, prior behavior, that to introduce here his arrest is simply something that's going to be more prejudicial than probative when the defense has the opportunity to cross-examine him on any

inconsistencies.

He has made numerous statements about this case long before he will testify and the -- you know, should he somehow change his testimony based on a belief that the government is going to assist him in his current legal troubles, the -- the defense will have every opportunity to -- to -- you know, to address that with him very directly with his statements at trial.

And I also recognize -- note that it is not to the government's benefit that he do this. Now, I realize that doesn't control what a witness says when they get on the stand.

So I think that primarily this is simply the facts and the -- where these statements came from. I agree that in general whether someone is -- expects there to be or thinks there's the potential for a benefit from the government, you know, yes, I agree generally that is bias. I think in this case, given the statements that we're going to be dealing with and his -- the testimony we expect him to make, the arrest is simply not something that needs to come in to address the possibility that he changes his statement, that he tries to please the government.

THE COURT: I would agree with you -- I'm sorry.

I would agree with you if the case were resolved. If it were resolved. But you still have him testifying, let's say, time two; he testifies in front of the jury. Time three is the future, when this -- when this DWI that could land him in jail for up to a year is resolved.

So at time two when he's testifying -- time one involves all his prior statements, right, but time two he's testifying and the jury is assessing his credibility at time two. And I think that the defense counsel gets to say at time two he's biased, he has this pending matter and he wants to either lock himself in to whatever, you know, false statements he made at time one and really embellish those because he's going to get a -- he's hoping for favorable treatment at time three.

If we didn't have time three, I think I'm agreeing with you that the -- that the fact that he made statements at time one that inculpated Mr. Craigue but at -- and then at time two makes statements in front of the jury. Without time three, I think we've got a problem in terms of bias. But if these -- this case is still pending.

Now, persuade me that, you know, they don't need to know that it's a DWI third involving controlled substances. I think I could agree with you on that.

The jury doesn't have to hear specifically what the charge is because DWI could really -- you know, could -- I think they could have an emotional negative reaction to that.

But my take on this is that it's classic bias because of time two and time three. If we didn't have time three, I would be -- I would be inclined to, I think, deny this. But I give a limiting instruction to the jury that this goes to bias. This comes in as to bias and motive. And that's it.

So that's my take on it. I want to ask Attorney Graham, though, if you have anything else to add before I ask Attorney Dronzek to give me a sense of, you know, whether or not it's a DWI or do I just tell the jury it's a -- you know, a Class A misdemeanor.

Go ahead, Attorney Graham.

MS. GRAHAM: Thank you, your Honor.

I think -- I do think the type of offense is important for the jury to understand, solely because of two factors. Well, not solely. For two factors.

One is that this is an offense, because it's a third offense, has a mandatory minimum and so it is important for his state of mind when he's testifying what he's looking at here.

So it is --

THE COURT: Well, couldn't they be told, though -- couldn't the jury be told there is a -- you're going to get -- you're going to get a minimum -- if you're found guilty, you're going to get a minimum time of X amount. They don't need to know it was a DWI.

MS. GRAHAM: I would agree, except I do think also that the jury is going to hear, which is -- has not been objected to -- that he has prior felonies that are drug-related. I think having the jury know that he is testifying in a federal case, knowing that he has had once again been arrested for what apparently was drug-induced driving while -- very soon after having been convicted of drug offenses is very relevant to his state of mind and his motive to want to help himself and curry favor with the government.

THE COURT: Attorney Dronzek?

MS. DRONZEK: I disagree, your Honor. In part, I don't believe that the previous drug conviction is close enough in time to this arrest. He has a prior -- he has a misdemeanor Class B for transporting drugs and he has a drug felony, but I don't believe it is close enough in time to try to draw the kind of connection that defense attorney wants to draw.

I also think that simply this is -- this is something that is -- is really essentially propensity

evidence. It's wanting to emphasize the fact that this is someone who is using drugs to try to draw the -- to imply to the jury that there is a -- perhaps an unbroken connection in drug use throughout this whole time.

I know we're going to get into issues of drug use further with the -- with the other -- the other motion in limine, but I -- I don't see any reason why knowing the nature of the offense -- if the issue is for bias, I agree that potentially something in terms of the significance of the case, that there's, you know, there is a mandatory minimum sentence should he be convicted, if that goes to the weight of the bias or the, you know, why this is significant for him, but I don't think that the nature of the offense goes to that bias at all. There's nothing about it being a DWI that makes the bias less or more and I think that connecting it to his previous history is simply going to be a way to get in propensity evidence that should be precluded for someone who's, you know -- they're assuming evidence that Erickson has struggled with drug use in his life, but to create this kind of unbroken narrative I think is extremely misleading.

THE COURT: All right. Unless Attorney Graham wants to add anything, I -- I am inclined to grant this motion for the reasons I stated, but I'm inclined to

agree with Attorney Dronzek's analysis of the alternative proposal that whatever we come up with in terms of telling the jury about this, I think that's something, again, we can put on the meet-and-confer list that counsel agree and perhaps even propose some limiting instruction. That -- that should be fairly simple, I think, in terms of what I tell the jury, but to the extent you want to fashion a particular limiting instruction everybody agrees on, go ahead. I will welcome that.

But my inclination is to say that this is still pending, we still have time three, so I think it is relevant at time two that this matter is pending. However, I -- I am open to the argument of Attorney Dronzek that the jury doesn't have to hear that it is a DWI to understand that there is something pending of some serious import.

Okay. So that's Motion in Limine #4.

MS. DRONZEK: Your Honor, may I --

THE COURT: Let's go to number -- yes, you may. Go ahead.

MS. DRONZEK: May I clarify?

So given that we are looking at a trial date in -- I don't remember where we are, April at this point, I think -- should this case -- should the case

result in -- actually be resolved before he testifies at trial, could we reopen this issue before you?

THE COURT: Yes. Because that, to me -- if, in fact, we don't have time three, at time two it's already resolved. So you're going to have to make a pretty strong argument, Attorney Graham, that this is relevant to bias. At that point I'm much more persuaded that that this does not come in.

Okay. Number 5 -- and this is the -- okay. This is a little bit complicated, Erickson's drug use.

Okay. And I think some of this is going to depend on, really, you guys making clear to me what the evidence is likely to show here. But we're talking about sort of different buckets or categories of evidence here because we're talking about the persistent history of drug use.

Now, he doesn't have a persistent history of alcohol use and I think that the defendants have conceded that at this point. It's drug use that we're talking about?

MS. GRAHAM: Yes. I -- I incorrectly believed it was alcohol for this most recent arrest.

THE COURT: Okay. So we're talking about drugs.

So there's this persistent history that --

that he allegedly has and then there's the current -- what's his current drug use at the time that he's testifying. So I guess we can still call that time two, time -- his testimony in front of the jury.

Now, at time one when he made all the statements that are close in time to the accident, August of 2018, I know he was -- he made statements to OSHA, he made statements in front of the grand jury. And I believe the grand jury was June of 2019, so that was a good distance from the statements he made close in time to the accident.

So we have these different times that are relevant to statements he made and then we have the two -- you know, sort of his history of drug use and then we've got what's his current drug use.

So just let me go through -- I will tell you that it seems to me that evidence of his drug use in or around the time of the accident -- so we're talking now summer of 2018, July, August, September 2018 -- that his drug use around that time is clearly relevant to his ability to perceive what's going on at the jobsite or recall the situation accurately. And I don't think the government disagrees with that. Stop me if I'm wrong, Attorney Dronzek. Just, you know, interject.

But the government doesn't want to have the

jury learn anything about the medical records. It seems to me the medical records would only be relevant on impeachment. So they know what's in the medical records, Erickson gets up and testifies in a way inconsistent with those medical records, it seems to me they get to ask him.

But tell me the scope of this argument. Are you -- are you simply saying that you want to introduce the medical records, Attorney Graham?

MS. GRAHAM: No, your Honor. My -- my purpose is to ask him on the stand what -- about his drug use at that time. Obviously if he's not truthful and I know that he's not truthful, then I would present those records.

THE COURT: Okay. All right. And does the government disagree that the records could become relevant if he -- if he -- if he testifies inconsistent with what's in them?

MS. DRONZEK: Yes, your Honor. I agree that there -- that, you know, if he opens the door by testifying inconsistently, then, yes, I agree that is -- then that would be relevant.

I think there would be a need to identify specific portions and redact, you know, nonrelevant material --

THE COURT: Yes.

MS. DRONZEK: -- just because of this kind of --

THE COURT: Of course.

MS. DRONZEK: -- medical records. But --

THE COURT: Okay.

MS. DRONZEK: -- I do agree that should he testify inconsistently with what's in the medical records that that's, you know, fair game for them to introduce them.

THE COURT: Okay. All right. So everybody basically is in agreement as to that.

So no question Erickson can be questioned about his drug use around the time of the accident as those questions will be relevant to his ability to accurately perceive and recall those events.

Time of the accident, obviously you'll have to make specific arguments to me, but I would think that in or around the time of the accident would be relevant and if he's addicted to drugs at that time, that's something I think that could affect -- it'd be highly probative of his credibility, his accuracy of his testimony.

So I'm guessing in that time frame, but -- somebody tell me why this is wrong, but I would think in that -- well, July is when he is injured and then August

is when McKenna has his accident and dies. And then statements are made by Mr. Erickson all the way through to, I think, the grand jury in June of 2019.

I would think his drug use could be potentially admissible with regard to anytime he's making statements. Any disagreement on that?

MS. DRONZEK: Your Honor, just simply that I don't think we have any evidence to point to drug use during the period that -- I don't think there's any foundation to ask about drug use during the period particularly when he's speaking to the grand jury. We have --

THE COURT: Okay. And I wouldn't know that, but that's -- that's fine. So if there isn't any evidence of that, then defense wouldn't necessarily have a basis or foundation to ask about it. So -- but if he's testifying, right, and at time two he comes in front of the jury, clearly that time would be relevant and I don't think the government's disagreeing with that.

So tell me -- tell me where the disagreements are that I need to resolve with respect to this motion.

MS. DRONZEK: Your Honor, I -- I don't -- I don't disagree that obviously a witness's drug use is relevant to ability to perceive, recall, and testify

competently. And with regard to testifying at this trial, I don't disagree that that drug use is relevant.

What I would propose is a voir dire of the witness outside the presence of the jury as a way to establish any foundation of drug use because what we have is -- with regard to more contemporary drug use that would be potentially relevant to trial testimony, we have an arrest in September of 2020. We're looking now at trial in April of 2021. Certainly the arrest is concerning, but in a vacuum, we don't have evidence that he's actually -- that he's engaged in drug use at the time of his trial testimony.

So presuming that there is sufficient evidence to think it's worth exploring, I would request that the Court conduct a voir dire of Erickson outside the presence of the jury to essentially lay a foundation for whether there is drug use.

If he testifies saying basically to some -- some form of drug use, whether that's illegal drug use or, frankly, is he on, you know, painkillers still for his injury, is he engaged in some kind of potentially medically approved drug, you know, regime, that -- if that is established, then I agree that the defense should be able to go into that in front of the jury, but I don't think at this point that it would make sense to

go into that in front of the jury without that kind of foundation. I think that --

THE COURT: I -- I don't think the defense is going to argue against, you know, laying a foundation outside the presence of the jury, but I'll let them speak to that because I would certainly be in favor of handling this carefully and handling it in the way that you suggest.

Are there Fifth Amendment issues that he's going to have because he has this pending DWI? Are there going to be Fifth Amendment issues with respect to Erickson's testimony with -- on his drug use?

MS. DRONZEK: Your Honor, that is --

THE COURT: And let me -- let me ask Attorney Graham to weigh in. I haven't.

Go ahead, Attorney Graham.

MS. GRAHAM: I guess there possibly could be if I'm asking at the time of trial if he's using drugs and he, for instance, has bail conditions that prohibit him from using drugs. That could certainly cause some concern for his attorney who's helping him on that DWI.

But I just wanted to address the question about voir dire. I think that I can -- I can lay, I think, an adequate foundation now, given what I know about this particular witness's history. This is going

to be the government's star witness because Mr. McKenna cannot testify. He's not here to testify. So they are going to really rely on his statements about all of the -- the issues that -- that are -- have been laid out today.

But this is an individual who has prior drug convictions: He's got two prior DWIs, convictions for possession -- possessing methadone, possessing oxycodone. At the date of his fall and his admission to the hospital, we know from -- from his medical records that he's testing positive for marijuana. We know that he's testing positive for nonprescribed Suboxone. Medical records show that in July he received five tablets of morphine and 50 tablets of oxycodone.

And by --

THE COURT: July when?

MS. GRAHAM: So July 28th, 2018. And then by July 31st, he had used all his medication and he was still seeking more.

And then his medical records from August of 2018 show that he had used prescriptions -- I'm sorry, from March 2019, the medical records indicate a conversation between the doctor and Erickson that he should be limiting his intake of benzos, that he has a chronic prescription benzo use, he's been counseled with

medication management for anxiety and insomnia, and then in June -- September of 2020, he then gets arrested.

And the behavior that's described in those police reports is really unsettling. They describe his demeanor as his speech was slow and slurred, his pupils were constricted, his eyelids were droopy, he was extremely lethargic, methodical, eyes rolled into the back of his head. All of this is concerning that -- and this is a long range of time that we're talking about, from 2015 in this drug use to September of 2020.

So I think that I've laid the foundation that this doesn't come out of left field. I'm not interested in embarrassing anyone. This is their star witness who should be cross-examined as to his ability to recall based on a very long-standing addiction, it looks like, to prescription drugs.

THE COURT: Yeah. No, I -- I think you have a good faith basis to ask these questions. There looks to be some time between, however, you know, August 2018 and September, his arrest in September of 2020, that would be worthy of asking him outside the presence of the jury, just to -- just to find out the scope of his -- you know, his drug use and allow you to ask specific questions about, you know, when you testified in front of the grand jury, were you under the influence of any,

you know, illegal drugs, were you -- when you spoke to OSHA, that kind of thing, and do that outside of the presence of the jury because it is so inflammatory.

And then once we get back in front of the jury, obviously, you'll know exactly sort of the range of his drug use, at least what he admits his drug use to be.

So that's my take on this. I think that's the safest way to go about this. I do think Attorney Graham has a good faith basis to ask about drug use certainly in or around the time of the accident, but it seems to me it's best just get him on the stand outside of the presence of the jury to figure out the time between, you know, his drug use that we know is substantiated in medical records and then the September 2020 drug use.

And then there's September 2020 time of trial as well is another time you'll want to ask him questions. And if his DWI is still pending, I can't imagine that his lawyer isn't going to have some concerns about, you know, the questions related to his drug use, particularly around the time of, you know, his arrest.

So that's something that I throw back to counsel, because obviously that's something worth exploring. He's your star witness, the government's

star witness. So I'll throw that back to the government to look into that and to the extent we need to have some sort of hearing on that, let's do that before this trial.

I think that we're clear now on number 5, that basically I -- I don't see a huge area of disagreement. The government is saying that, you know, there's got to be a proper foundation for these gaps in time and the government wants questions outside the presence of the jury. I'm inclined to approach it that way. But, generally, drug use at these relevant times is going to be admissible and I don't see the government arguing that it's not admissible.

Am I right about that?

MS. DRONZEK: That's correct, your Honor.

THE COURT: Okay. So the question just becomes, you know, how much evidence of drug use is there and are there gaps in what -- what the defense understands to be the evidence of his drug use and they explore that outside the presence of the jury.

So it does seem to me that the defense would be able to question McKenna -- I'm sorry -- Erickson out of the box on the stuff that they know about, which is, you know, close in time to his original statements and that they have a basis to ask about that before any

out of the jury questioning happens and they would certainly have the ability to ask him about this pending case and the arrest.

But with respect to areas where there really is this gap, I think we do it outside the presence of the jury.

Is -- so is that clear to everybody in terms of Motion in Limine #5?

MS. GRAHAM: Yes. Understood, your Honor.

MS. DRONZEK: Yes, your Honor.

THE COURT: Okay. Good. So I think that -- that at least takes care of everything that's in front of me today.

I know the 404(b) issues and the other Motion in Limine #2 are -- that is going to be a hearing probably as long as this one, I'm guessing. I know it's scheduled for next week, I think, and I'll see you for that hearing next week.

And, meanwhile, I know you're going to meet and confer and talk about joint proposed instructions to deal with the willfulness instruction; to deal with the knowingly instruction; the false, fictitious and fraudulent and how that's handled, that was something Attorney Mirhashem brought up; and then also proposed instructions regarding the *Darden* factors, now that you

know that I'm inclined to give those to the jury.

And if you need any kind of extension on getting those first -- getting the proposed instructions to me, you know, I think -- I think if you can get those to me sooner rather than later, I can get you a draft sooner rather than later. So hopefully that'll be incentive enough to have you file that, you know, within 30 days.

And I'll see you next week for the 404(b) hearing.

Anything else before we adjourn?

MS. DRONZEK: Not from the government your Honor.

MS. GRAHAM: No, thank you.

THE COURT: All right. Good. Thank you, counsel.

Court is adjourned.

MR. GINGRANDE: Thank you, your Honor.

(Proceedings concluded at 11:45 a.m.)

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 2/11/21

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR